No. 80-892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GAF CORPORATION,

Petitioner,

VS.

JAMES K. J. CHENG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM[1]

Recent decisions of this Court reported after the filing of GAF's[2] petition and Cheng's brief in opposition squarely conflict with the decision of the Court of Appeals for the Second Circuit.[3] These cases so clearly control that the petition should be granted and the judgment of the Court of Appeals should be summarily vacated and the case remanded with instructions to dismiss the appeal for want of jurisdiction.

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[1] This Memorandum may also be properly characterized as a Supplemental Memorandum.

[2] GAF has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

[3] The opinion of the Court of Appeals is now officially reported at 631 F.2d 1052 (2d Cir. 1980).

I.

The Decision of the Court of Appeals Conflicts With This Court's Decisions in *Firestone Tire & Rubber Co.* v. *Risjord* and *McAlpin* v. *Armstrong*.

The Court of Appeals in this case reached the merits of the propriety of disqualifying GAF's counsel despite its previous *en banc* ruling in *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980), that an order denying a motion to disqualify counsel was not appealable prior to final judgment under 28 U.S.C. § 1291.[4] The decision to reach the merits of the disqualification dispute by applying *Armstrong* prospectively directly conflicts with cases decided subsequently by this Court.

Firestone Tire & Rubber Co. v. *Risjord*, 49 U.S.L.W. 4089 (U.S. Jan. 13, 1981), held that a district court's order denying a motion to disqualify counsel is not appealable under 28 U.S.C. § 1291 prior to final judgment and that, as the finality requirement embodied in 28 U.S.C. § 1291 is jurisdictional in nature, a court lacks discretion to consider the merits of a case over which it is without jurisdiction. *Id.* at 4092. On this basis, the Court vacated the judgment of the Court of Appeals for the Eighth Circuit and remanded the case with instructions to dismiss the appeal for want of jurisdiction.

A similar result obtained when *Armstrong* reached this Court on petition for a writ of certiorari. *McAlpin* v. *Armstrong*, 49 U.S.L.W. 3514 (U.S. Jan. 19, 1981). Citing *Fire-*

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[4] 28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

stone, the Court summarily vacated the judgment of the Court of Appeals for the Second Circuit and remanded the case for dismissal of the appeal.

The conflict presented regarding the appellate jurisdiction of federal courts warrants review in order to assure uniformity of decisions.

II.

This Case Is Ripe for Summary Disposition.

The Court made a summary disposition of *McAlpin,* implicitly finding, by relying on *Firestone,* that there was no showing that the opportunity for meaningful review would perish unless an immediate appeal were permitted. *See Firestone,* 49 U.S.L.W. at 4091. In *Firestone,* this Court observed that: "[P]etitioner fails to supply a single concrete example of the indelible stamp or taint of which it warns." *Id.* at 4091. The Court of Appeals in this case likewise found no more than the possibility that the underlying trial could be tainted. 631 F.2d at 1059. *Firestone* teaches that much more than a mere possibility of taint is required before a ruling denying disqualification may be considered "effectively unreviewable" absent immediate appeal. *Id.* at 4091. Both *McAlpin* and this case are progeny of *Firestone.* The results of both cases should be the same.

For the above reasons, GAF urges the Court to grant review of the judgment and decision of the Court of Ap-

peals and summarily vacate the judgment, remanding the case to dismiss the appeal.

Respectfully submitted,

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